VOLUNTARY SEGREGATION HELD NOT ILLEGAL DISCRIMINATION

Musicians' Locals 814 and 1
88 Ohio L. Abs. 491, 19 Ohio Op. 2d 26, 7 Race Rel. L. Rep. 288
(Civ. Rights Comm'n 1962)

The Ohio Civil Rights Commission[1] filed a self-initiated complaint[2] against two Cincinnati locals of the American Federation of Musicians. The Commission charged Local 1, an all-white union, and the predominantly Negro Local 814, with discriminatory practices in violation of the Ohio Fair Employment Practices Act.[3] The two locals were alleged to have followed a consistent practice of limiting membership on the basis of race or color and to have discriminated in matters of employment opportunities, wages, and terms and conditions of employment on the basis of race or color.[4]

The trial examiner found that a pattern of segregation existed as a result of voluntary adherence to customs and not as a result of discrimination. Local 1 had offered to merge with Local 814, but the latter rejected this offer after a vote against merger by its members. Local 814 included five white musicians in its membership and held its doors open to any competent musician of good moral character. Actual differences in employment opportunities, wages, and conditions were noted to the detriment of Local 814 members. The trial examiner concluded that these differences resulted from organizational strength, rather than from discriminatory practices. He recommended that the complaint be dismissed. The Commission conceded that there was de facto segregation and that segregation is discrimination under Ohio law. The Commission also admitted the existence of inferior employment opportunities, yet upheld the recommendation of the trial examiner.[5]

The factual pattern of this administrative litigation is unique; no state

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[1] The Ohio Civil Rights Commission was created as a part of the Ohio Fair Employment Practices Act, Ohio Rev. Code §§ 4112.01-.08, .99 (1959). It functions in the areas of employment and public accommodations. Jurisdiction in the latter area was granted by the Ohio Legislature in 1961. The original Act is discussed in Robison, "The New Fair Employment Law," 20 Ohio St. L.J. 570 (1959). The 1961 amendment giving jurisdiction in the area of public accommodations is discussed in Van Alstyne, "Civil Rights: A New Public Accommodations Law for Ohio," 22 Ohio St. L.J. 683 (1961).

[2] Nine state commissions may initiate complaints on their own motion. Hartman, Comparative Analysis of State Fair Employment Practices (1960). Some additional commissions do so without direct statutory authority. See Note, "The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation," 74 Harv. L. Rev. 526, 528 (1961). The case at bar is the first instance of a reported formal hearing where the complaint was originally issued on the motion of the Commission. Arguably this is evidence that state civil rights agencies have interpreted their function more as quasi-judicial than as an affirmative force against discrimination. See 1 Davis, Administrative Law § 4.08 (1958); Note, "The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation," *supra* at 530.

[3] Ohio Rev. Code §§ 4112.01-.08, .99 (1959).

[4] In violation of Ohio Rev. Code §§ 4112.02(c)(1), (2), (e)(5), (h) (1959).

[5] Musicians' Locals 814 and 1, 88 Ohio L. Abs. 491, 19 Ohio Op. 2d 26, 7 Race Rel. L. Rep. 288 (Civ. Rights Comm'n 1962).

civil rights agency has considered the problem of dual locals in a formal hearing.[6] The refusal of Local 814 to accept the offer of merger placed the Commission in an awkward position. If the Commission decided that dual locals separated on the basis of race or color were illegal, it would probably have had to order merger of the locals.[7] Merger would entail forcing members of a minority group to accept integration against their wishes. The Commission avoided this awkward solution by finding that there was no proof of illegal discrimination. The Commission admitted there was de facto segregation, but found no member of either local who was dissatisfied with the separate facilities. In effect they required that there be a dispute before relief will be granted. The standard of proof requiring injury and a dispute for illegal discrimination is quasi-judicial and is not the standard of an agency created to provide affirmative action against discrimination.[8]

[6] The problem was recognized in 3 U.S. Comm'n on Civ. Rights Report, Employment 131 (1961). Three civil rights agencies have been confronted with dual local situations at the conciliatory stage. The Ohio Commission declared dual locals to be illegal, Case IV, 1960 Ann. Rep. of the Ohio Civ. Rights Comm'n 24. The New York Commission gave the two locals involved a reasonable time to effect merger, Brown v. Brotherhood of Ry. and S.S. Clerks, C-449-57, N.Y. Comm'n Against Discrimination 1957 Report of Progress 81. The Massachusetts Commission settled the point at issue by ordering an all-white local to accept a Negro member. The report stated that efforts were being made to effect a merger of the two locals. Case XVII, Mass. Comm'n Against Discrimination 1956 Report 12. Insofar as conciliatory decisions are precedent, the case at bar is contrary to precedent. For an opinion on the weight of conciliatory decisions as precedent, see Robison, *supra* note 1.

[7] The remedial power granted by the Act is broad. Ohio Rev. Code § 4112.05(G) states that upon a finding of an illegal practice, the Commission "shall issue . . . an order requiring the respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes [of the Act] including but not limited to, hiring, reinstatement, or upgrading employees with, or without, back pay, admission or restoration to union membership. . . ." The trial examiner observed that a remedy requiring merger would be more drastic than the specific remedies listed in the Act. He concluded, therefore, that the Legislature would not have intended for the Commission to effect dissolution or merger of complex business units under the authority of a civil rights statute. The Commission did not accept this part of the examiner's opinion and reserved comment until it is confronted with the issue.

A remedy is too drastic only within context. Here there would be a merger of two locals of the same national union operating in the same jurisdiction. Operation of dual locals is against the policy of the national union and the labor movement in general. See statement by George Meany in 3 U.S. Comm'n on Civ. Rights Report, Employment 130 (1961). Within this context the merger does not seem drastic. However, courts have inflicted strong remedies to effect the purposes of general statutes. Consider Standard Oil Company of New Jersey v. United States, 212 U.S. 1 (1911), where the drastic remedy of dissolution was used to obtain genuine competition. Was this objective any more socially desirable than the objective of elimination of racial discrimination in the instant case? It would be an unfair burden on the legislature to require it to show its intent by listing all conceivable remedies.

[8] See Note, "The Right to Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation," *supra* note 2, at 530.

There is a valid argument for a more affirmative role by all state civil rights agencies. They were created to protect minority rights and to benefit the public welfare by eliminating and preventing discrimination. The interest of the public at large was as great a consideration as the protection of the rights of minority individuals and groups.[9] Discrimination reduces the intellectual and technical potential of our population,[10] burdens the state with welfare costs and unemployment problems,[11] and causes racial strife. It reduces the purchasing power of minorities and consequently retards economic growth.[12] Discrimination weakens the democratic ideals and institutions of our society. The Ohio Commission has limited itself to protecting the rights of minority groups within the framework of a dispute. The decision ignores the interest of the public welfare in eliminating and preventing discrimination.[13]

Whatever the public welfare considerations, the Ohio statute itself implies a more affirmative role than that taken by the Ohio Commission. The agency is permitted to initiate a complaint upon its own motion, or any person may bring a complaint.[14] The Commission is not bound by judicial rules of evidence, and it may use statistical evidence in support of a decision.[15] The problems of discovery and proof have made these extraordinary provisions and a positive role for civil rights agencies necessary.[16] Individuals normally discriminated against are peculiarly subject to economic coercion and characteristically ignorant of their rights and remedies.[17] The weakness of the quasi-judicial approach is exposed when the two locals in the instant case were left to compete with each other on the basis of race or color, and employers were left with a perfect mechanism by which to discriminate without detection, *i.e.*, they could merely call one local or the other. The separate facilities are contrary to the purposes of the Ohio act. It would be illegal to

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[9] Most state antidiscrimination laws are patterned after the original New York Act. See N.Y. Executive Law § 290 for support of the proposition that antidiscrimination laws were passed to benefit the public as a whole as well as minority groups and individuals.

[10] See Ferman, "Discrimination in Employment," 6 N.Y.L.F. 59 (1960).

[11] See "Anti-Discrimination Commissions," 3 Race Rel. L. Rep. 1085, 1086 (1958).

[12] See "Discrimination in Housing: How It Hurts the Economy," Newsweek, September 3, 1962, 62-65.

[13] In Hammer v. Dagenhart, 247 U.S. 251 (1918), a father on his own behalf and as next friend of his two employed minor sons filed a bill to enjoin enforcement of the congressional act preventing interstate shipment of the products of child labor. The act was declared unconstitutional, but the case was expressly overruled in United States v. Darby, 312 U.S. 100 (1941). The shortrun interests of the members of a protected group are not controlling over the interests of the public, and of the group as a whole.

[14] Ohio Rev. Code § 4112.05(B) (1959).

[15] Ohio Rev. Code § 4112.05(E) (1959).

[16] See Note, "An American Legal Dilemma—Proof of Discrimination," 17 U. Chi. L. Rev. 107 (1949).

[17] See Note, "The Operation of State Fair Employment Practices Commissions," 68 Harv. L. Rev. 685, 691 (1955); Ferman, *supra* note 10, at 66, 67.

call a musicians' local and ask for a white or a Negro band.[18] The statute requires liberal construction for the accomplishment of its purposes.[19] Locals 1 and 814 were charged with limiting or classifying their membership on the basis of race or color. They did so by maintaining separate facilities for their respective races. Admittedly no one is banned on the basis of race or color from obtaining membership in either union, yet Local 814 came into existence to provide a separate local for Negro members, and there is no other reason for having two locals in the same jurisdiction today. Dual unionism is a judicially approved basis for union expulsion.[20] Dual locals are not permitted for any reason other than racial segregation within the labor union movement. Under a liberal construction, the maintaining of dual locals separated on the basis of race or color could be found to be a violation of Ohio Revised Code section 4112.02(C)(1) which prohibits labor organizations from limiting or classifying their membership on the basis of race or color.[21] Since the members of Local 814 suffer detriments in employment opportunities and wages as a result of this classification, there also seems to be a violation of Ohio Revised Code sections 4112.02(C)(2) and (E)(5).[22]

A constitutional problem may have arisen if the Commission had ordered the two locals to merge. However, the public interest in integration is stronger than Local 814's members' right to freedom of association.[23] Labor unions function more and more as economic institutions and less as social associations.[24] The social interest of their members is infinitesimal and the economic interest primary and increasingly significant. The parent union of these locals will no longer charter dual locals, and it encourages merger of

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[18] See Van Cleve Hotel Co., 18 Ohio Op. 2d 229, 7 Race Rel. L. Rep. 270 (Ohio Civ. Rights Comm'n 1962).

[19] Ohio Rev. Code § 4112.08 (1959).

[20] See Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 190 (1960).

[21] Ohio Rev. Code § 4112.02(C)(1): "It shall be an unlawful discriminatory practice . . . for any labor organization to . . . limit or classify its membership on the basis of race, color, religion, national origin, or ancestry; . . . ."

[22] Ohio Rev. Code § 4112.02(C)(2): "It shall be an unlawful practice . . . for any labor organization to . . . discriminate against any person or limit his employment opportunities or otherwise adversely affect his status as an employee, or his wages, hours, or employment conditions, because of his race, color, religion, national origin, or ancestry."

Ohio Rev. Code § 4112.02(E)(5): "It shall be an unlawful discriminatory practice . . . except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, or labor organization prior to employment or admission to membership, to . . . announce or follow a policy of denying, or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, national origin, or ancestry of such group; . . . ."

[23] For a definition and general discussion of this new constitutional concept, see "Freedom of Association," 4 Race Rel. L. Rep. 207 (1959); Abernathy, "The Right of Association," 6 S.C.L.Q. 32 (1953).

[24] See Van Alstyne and Karst, "State Action," 14 Stan. L. Rev. 3, 38 n.69 (1962).

existing segregated locals.[25] Local 814 members derive some economic benefit from undercutting the union scale, but undercutting scale is a practice absolutely contrary to the policy of trade unionism. Within this context Local 814's members' interest in freedom of association seems insignificant in comparison to the interests of the public at large in elimination and prevention of racial discrimination. Where the public interest is larger than the constitutional rights of the individual affected, the state may exercise its police powers in conformance with the public's interest.[26] The constitutional rights to freedom of speech, assembly and association deserve a very high degree of protection in our society, but there are public welfare considerations which override them in situations where the interest in the right is small and the public welfare interest is great.

[25] Musicians' Locals 814 and 1, *supra* note 5, at 495, 19 Ohio Op. 2d at 27, 7 Race Rel. L. Rep. at 289.

[26] See Communist Party, U.S.A. v. Subversive Activities Control Bd., 367 U.S. 1, 90-95 (1960). Here the Supreme Court upheld a limiting of the freedom of association for the good of the public as a whole.